U.S. Department of Justice

Immigration and Naturalization Service

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PUBLIC COPY

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: SRC 03 008 50028 Office: Texas Service Center Date: FEB 28 2003

IN RE: Petitioner: [redacted]
Beneficiaries

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(b)

IN BEHALF OF PETITIONER: [redacted]

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center, and certified to the Administrative Appeals Office (AAO) for review. The decision of the director will be affirmed.

The petitioner is in the business of providing cleaning services to the hospitality industry in and around the Orlando, Florida area. It desires to employ the beneficiaries as housekeeping cleaners for one year. The Department of Labor determined that a temporary labor certification by the Secretary of Labor could not be made. The director determined that a temporary need for the beneficiaries' services had not been established.

On certification, counsel states that there are five peak seasons each year in the Orlando area hospitality industry. Counsel also states that if the petitioner were to file an H-2B application for each peak season, they would have to file five separate applications at five different times during the year.

Section 101(a)(15)(H)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(ii), defines an H-2B temporary worker as:

> an alien...having a residence in a foreign country which he has no intention of abandoning, who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country, but this clause shall not apply to graduates of medical schools coming to the United States to perform services as members of the medical profession....

Matter of Artee Corp., 18 I&N Dec. 366 (Comm. 1982), codified in current regulations at 8 C.F.R. § 214.2(h)(6)(ii), specified that the test for determining whether an alien is coming "temporarily" to the United States to "perform temporary services or labor" is whether the need of the petitioner for the duties to be performed is temporary. It is the nature of the need, not the nature of the duties, that is controlling. *See* 55 Fed. Reg. 2616 (1990).

As a general rule, the period of the petitioner's need must be a year or less, although there may be extraordinary circumstances where the temporary services or labor might last longer than one year. The petitioner's need for the services or labor must be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need. 8 C.F.R. § 214.2(h)(6)(ii)(B). The petition indicates that the employment is seasonal and the temporary need recurs annually.

The regulation at 8 C.F.R. § 214.2(h)(6)(ii)(B)(2) states that for the nature of the petitioner's need to be seasonal, the petitioner must establish that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The petitioner shall specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner's permanent employees.

The nontechnical description of the job on the Application for Alien Employment Certification (Form ETA 750) reads:

> Prepare spotlessly required number of rooms, including but not limited to making beds, carpet care, dusting & bathroom cleaning. Maintain per hotel's standards all aspects of dusting, washing, scrubbing, vacuuming, supplies, placement, carpet & upholstery care. Replenish attractive array of supplies in bedrooms & bathrooms. Safely & correctly use various cleaning chemicals, materials & equipment. Maintain neat & tidy cart & linen room. Ensure compliance with fire & emergency regulations/procedures.

Upon review, the petitioner has a permanent need for workers to perform cleaning services, which is the specific nature of the petitioner's business. The services to be rendered cannot be classified as seasonal work as the petitioner has not shown the services or labor to be traditionally tied to a season of the year by an event or pattern. The petitioner has an ongoing, year-round need for cleaners. Consequently, the petitioner has not established that the nature of its need for housekeeping cleaners is seasonal and temporary in nature.

This petition may not be approved for another reason. The petitioner has not been shown to be the actual employer. In a letter dated November 12, 2002, counsel states that during the peak tourist seasons, the petitioner cannot meet the demands of its clients for housekeeping cleaners simply because there are not enough United States workers to fill these positions. To meet the demands of its clients, the petitioner will require a permanent cadre of employees available to fill the positions on a continuing basis. In this instance, it is the petitioner's business to supply workers. The ETA-750 indicates that the beneficiaries will work in Orlando, Kissimmee, & Cocoa Beach, Florida. Consequently, the petitioner has a permanent need to have workers available to perform the requisite labor or services at other work sites. For this additional reason, the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not met that burden.

ORDER: The decision of the director is affirmed. The petition is denied.